NATIONAL UNION OF HOTEL, BAR & RESTAURANT WORKERS *a*

v.

CASUARINA BEACH HOTEL SDN. BHD.

FEDERAL COURT, KUALA LUMPUR
WAN SULEIMAN SCJ
MOHD. AZMI SCJ *b*
HASHIM YEOP SANI SCJ
[APPEAL NO. 237 OF 1983]
14 DECEMBER 1985

LABOUR LAW: *Interpretation of Collective agreement - Sections 14(2), 16(2), 17, 56 of the Industrial Relations Act 1967 - Legal effect of termination - Contractual principles - Types of "awards" in Section 2 - Termination/modification by parties - Meaning of "plain and unambiguous".* *c*

LABOUR LAW: *Employment - Termination - Employment Ordinance 1955 - Termination of employment under contract of service as distinct from termination of terms and conditions of employment under collective agreement.* *d*

ADMINISTRATIVE LAW: *Industrial Court - Excess of jurisdiction - Error of law - Meaning of jurisdictional dispute - Sections 20, 26, 56(1) of the Industrial Relations Act - Res judicata.*

The main issue here was the legal effect of the termination of a 1975 collective agreement made between the appellant/Union and the respondent/Company. When the 1975 agreement was terminated by the Union under Article 1(b) of the agreement, the Union took the view *e* that notwithstanding such termination, the terms and conditions of the agreement including payment of additional EPF contribution by the Company under Article 30 should continue to remain in force until superseded by a new collective agreement. The Company took the opposite view and informed the Union that they (the Company) were no more bound by the terms of the terminated agreement. The Union then lodged a complaint to the Industrial Court under s. 56(1) of the Industrial Relations Act 1967 (the Act) alleging non-compliance by the *f* Company of Article 30 of the 1975 agreement.

By an award No. 5/80 ("Abraham Award"), the Industrial Court accepted the Company's view. Dissatisfied with this, the Union lodged a complaint under s. 56(1) for non-compliance by the Company of various terms other than Article 30 in the 1975 agreement. This complaint was heard in another Division of the Industrial Court by Harun J where *g* the Union also successfully introduced its complaint of Company's non-compliance with Article 30. By award No. 6/81 ("Harun Award") the Industrial Court agreed with the Union's interpretation of Article 1(b) of the agreement. The Company then applied by way of *Certiorari* for the purpose of quashing the Harun Award; Razak J in the High Court allowed the Company's motion, quashed the Harun Award and upheld the interpretation of Article 1(b) of the agreement as contained in the Abraham Award. The *h* Union then appealed to the Federal Court.

The relevant issues in the Federal Court were -

(i) The legal effect of the termination of the 1975 collective agreement

(ii) The proper interpretation to be given to Articles 1(a), (b) and (c) of the 1975 collective agreement *i*

(iii) Whether the Industrial Court presided by Harun J had jurisdiction to hear the complaint on non-compliance by the Company of Article 30 and whether the Industrial Court had, in the Harun Award, committed an error of law in construing Article 1(b) of the agreement.

Held:

[1] (By the Court, Hashim Yeop Sani SCJ dissenting)

(a) The question of whether Harun J had jurisdiction to hear the same complaint after Mr. Abraham had dealt with it earlier in another division of the Industrial Court is a jurisdictional dispute in the narrow and original sense. The question of whether the interpretation of Article 1(b) made by Mr. Abraham is of the better view than that expressed by Harun J is a jurisdictional dispute in the wider sense. Since the former dispute depends on the outcome of the second dispute, the Court has to determine if the interpretation of the 1975 agreement as determined by Mr. Abraham and upheld by Razak J was the correct one.

(b) If the parties had intended that notwithstanding termination of the terms of the agreement, the terms of the agreement would nevertheless continue to have that effect until the replacement of a new agreement, then they would have to have provided a saving clause or continuation clause to that effect in the agreement. There was no such clause here.

per Wan Suleiman SCJ:

> We were assured from the Bar that most collective agreements have a "continuation clause" keeping alive the "terminated" agreement until a new one is agreed upon, a negotiating exercise which may take considerable time. Perhaps the majority judgment will ensure that such a continuation clause becomes a standard provision in all collective agreements.

per Hashim Yeop Sani SCJ dissenting:

> The exclusion of a continuing clause does not have any legal effect. It could at best amount to *ex abundanti cautela*.

(c) On the true construction of s. 17(2) of the Act, terms which are not in the agreement cannot be implied into the contract of service but terms which can be implied are those limited to rates of wages and conditions of employment unless varied by a subsequent agreement or a decision of the Court in which event they shall be in accordance with those terms.

(d) The words "unless varied by ... subsequent agreement or decision of the Court" in s. 17(2) are subservient to the operative clause or time frame in the first part of s. 17(2) thus the variation agreement would only be effected during the binding period of the agreement. Under s. 56(1), the complaint must be made when the collective agreement is still operative.

(e) Under Article 1, termination of the agreement does not mean termination of the employment under the contract of service but means termination of terms and conditions of employment as agreed upon under the collective agreement.

(f) There are two types of awards under the Act. In this case, the award here is deemed to be an award under s. 17 because the collective agreement was entered into voluntarily. In this type of award the Act preserves the freedom to contract by the parties subject only to compliance with provisions of the Act, especially ss. 14 and 15.

(g) There is nothing in s. 17 to suggest that a collective agreement though deemed to be an award cannot be terminated or modified by the parties. Section 14(2)(c) empowers the parties to prescribe in the agreement a procedure for modification or termination. The Act also permits the ordinary law of contract to be applied for modification or termination.

(h) Therefore, once the collective agreement was terminated in accordance with its terms, it ceased to be binding on the parties and under s. 17(2) the terms of the agreement should no longer be implied into the contract of service after termination even for the purpose of renegotiation unless expressly so provided by the agreement itself.

(i) It has never been the case for the Union that the agreement has not complied with s. 14 or other provisions of the Act. Razak J was therefore correct in refusing to read into the agreement a continuation or saving clause after its termination. The termination of the contract as envisaged in Article 1(b) of the agreement just as the word "termination" in s. 14(2)(c) of the Act must mean termination pure and simple.

(j) In the circumstances, Harun J had committed a jurisdictional error in his interpretation of Article 1(b) of the agreement and s. 14(2) and s. 17(2) of the Act. Therefore, the Harun Award was validly quashed by Razak J

[2] Dissenting judgment of Hashim Yeop Sani SCJ

(a) On the question of whether the Harun Court in 1981 was deprived of jurisdiction to hear the complaint after the Abraham Court award had been handed down in 1979, the issue of *res judicata* was discussed

per Hashim Yeop Sani SCJ:

> To constitute a *res judicata*, an earlier judgment or decision must necessarily and with precision determine the point in issue. *Kok Hoong v. Leong Cheong Kweng Mines Ltd.* [1964] AC 993. In my opinion there is no question of *res judicata* applying in the instant case because non-compliance can happen on successive occasions and as many complaints can be made as there are non-compliances. Also, the Abraham Court expressly made **no order** and for this reason there was in effect no order to be set aside and no order binding on the parties for the award was made under s. 56 and not under s. 33 of the Act for the interpretation of the agreement.

(b) On the question of interpretation of Articles 1(b) and (c) of the collective agreement, His Lordship, after stating that s. 14 of the Act is a general provision on collective agreements and that s. 17 is a specific provision on collective agreements said, "The proper approach to the construction of Clauses 1(b) and (c) of the agreement must be so such as to give meaning to the system of collective bargaining between employers and employees. Otherwise it will result in an absurd situation whereby the workers' benefits achieved as a result of collective bargaining will be reduced to nought at the end of every three years when the parties wish to renegotiate for a new collective agreement. Surely that is not the intention of the parties. Surely it is also not the intention of Parliament to allow the benefits enjoyed by the workers for the three years to lapse altogether and the renegotiation to begin from scratch. There must be continuity and stability in the relationship of employers and workmen otherwise there will be chaos in industrial relations. In my view Abdul Razak J overlooked these broad objectives of Industrial Relation law when he gave too much emphasis on the technicality of the law of contract of employment. The words "as

from such date and for such period as may be specified in the collective agreement" appearing in Sub-section 2 of s. 17 of the Act should be construed in the context of the section in which they appear. No collective agreement taken cognisance of by the Court shall be varied or replaced except by a subsequent agreement or a decision of the Court."

(c) The Harun Court therefore had jurisdiction to hear the complaint under s. 56 of the Act and to make the award and it had not committed any jurisdictional errors in arriving at the award.

[Appeal dismissed with costs.]

Cases referred to:
Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 AC 147
In re Racal Communications Ltd. [1980] 3 WLR 181
Hotel Jaya Puri v. The National Union of Hotel Bar & Restaurant Workers [1980] 1 MLJ 109
Trengganu Bus Company Sdn. Bhd. v. Transport Workers Union [1983] 1 MLJ 393
Curtis v. Stovin [1889] 22 QBD 512
Ditcher v. Denison, 14 ER 718
Cowper-Essex v. The Local Board of Action [1889] 14 AC 153
Duport Steels v. Sirs [1980] 1 WLR 142
Nothman v. Barnet London Borough Council [1978] 1 WLR 220
Kok Hoong v. Leong Cheong Kweng Mines Ltd. [1964] AC 993; [1964] MLJ 49
Burn & Co. v. Their Employees [1957] AIR SC 38
United Engineering Workers Union v. Devanayagam [1967] 2 All ER 367

Legislation referred to:
Constitution of Ceylon, s. 55
Industrial Relations Act 1967, ss. 2, 14, (2), (2)(b)(c), 15, 16(2)(a), 16(2)(b), 17, (1), (2), 33, (b), 56, (1), (2)

For the appellant - D.P. Xavier; M/s. D.P. Xavier & Co.
For the respondent - Sri Ram; M/s. Sri Ram, Zulkifly & Kumar

JUDGMENT

Mohd. Azmi SCJ:

This appeal arose from the interpretation of Article 1 Clause (b) collective agreement on terms and conditions of employment entered into on 29 December 1975 between the appellant (hereinafter referred to as "the Union") and the respondent (hereinafter referred to as "the Company"). Under the heading of "Period and Termination of Agreement", Article 1 is in the following terms:

Clause (a) This Agreement shall be effective and in force for three (3) years from 1 June 1975 to 31 May 1978.

Clause (b) The Agreement shall continue to be in force for a period of three (3) years from the said date and shall continue thereafter unless terminated by either party giving three (3) months notice in writing to re-negotiate but no such notice shall be given before the 1 March 1978.

Clause (c) During the period of this Agreement, neither the Company nor the Union shall seek to alter, modify, annul or add to any of its terms whatsoever except by mutual consent or by operation of Law.

There can be no dispute that under Article 1(a), the collective agreement must continue in force for a minimum period of three years with effect from 1 June 1975 and thereafter Article

1(b) made provision for the agreement to continue after the three-year period. In short, it would be binding until either party wished to renegotiate in which case such party must first terminate the agreement by giving three months' notice in writing. Under Article 1(c) the terms of the agreement cannot be altered or modified during the period when the agreement is still in force "except by mutual consent or by operation of Law". It cannot be challenged that the terms of Article 1 are in compliance with s. 14(2) of Industrial Relations Act 1967 which *inter alia* provides:

> A collective agreement shall set out the terms of the agreement and shall, where appropriate:
>
> (a) name the parties thereto;
>
> (b) specify the period it shall continue in force which shall not be less than three years from the date of commencement of the agreement;
>
> (c) prescribe the procedure for its modification and termination;

Well after the minimum three-year period had passed, the Union decided to renegotiate with a view to entering into a new collective agreement. For that purpose the Company requested the Union to terminate the agreement as require by Article 1(b) which the Union did by giving three months' notice *vide* letter dated 3 February 1979. The agreement was thus terminated in May 1979. The crux of the dispute in the present appeal is: what is the legal effect of such termination? Does termination of the agreement mean what it normally means under the general principle of contract as for instance found in the Employment Ordinance 1955 in that all the terms of the agreement would cease to be binding on both parties; or does it mean something else having regard firstly to the words used in the agreement itself and secondly to the provisions of the Industrial Relations Act 1967 in particular s. 17 under which a collective agreement which has been taken cognizance of is deemed to be an award of the Industrial Court and therefore incapable of being terminated by the parties under the terms of the agreement? Before dealing with these questions of law, it is convenient to refer briefly to the facts leading to this appeal.

The terminated 1975 agreement, *inter alia*, made provision under Article 30 for the Company to contribute every month 12% of the workers' total amount of monthly wages, inclusive of special relief allowance, cost of living allowance and food allowance to Employees Provident Fund, i.e. the Company should contribute 5% additional contribution to the statutory rates prescribed in the Employees Provident Fund Act. When the 1975 agreement was terminated by the Union under Article 1(b), the Union took the view that notwithstanding such termination, the terms and conditions of the agreement including payment of additional EPF contribution by the Company under Article 30 should continue to remain in force until superseded by a new collective agreement. But the Company took the opposite view. On 17 May 1979, the Company informed the Union by letter that as from May 1979, i.e. on expiry of three months' notice, the Company would no longer be paying the additional EPF contribution since they were no more bound by the terms of the terminated agreement. In the result, the Union lodged a complaint to the Industrial Court under s. 56(1) of the Industrial Relations Act 1967 alleging non-compliance by the Company of Article 30 of the 1975 agreement. Section 56(1) provides:

> Any complaint that any term of any award or of any collective agreement which has been taken cognizance of by the Court has not been complied with may be lodged with the Court in writing by any trade Union or person bound by such award or agreement.

The complaint came up for hearing on 26 July 1979 in Penang with Mr. M. Abraham presiding. By award No. 5/80 (for convenience, referred to as "Abraham Award"), the Industrial Court

accepted the Company's interpretation of Article 1(b) of the agreement and came to a decision that there was no non-compliance by the Company of Article 30. The Court was of the view that on the construction of Article 1(b), once the 1975 agreement had been terminated, it ceased to have binding effect on the parties. As there could not be any non-compliance of a terminated agreement, Abraham Award made no order on the Union's complaint. The Union was dissatisfied with Abraham Award and filed a Motion in the High Court to quash the said award, but for some reason the Motion was withdrawn. Instead, another complaint was lodged by the Union under s. 56(1) for non-compliance by the Company of various terms other than Article 30 in the 1975 agreement. This time the complaint came up for hearing before another Division of the Industrial Court presided by Harun J. By means of oral application, the Union successfully reintroduced its complaint on the Company's non-compliance with Article 30 which had been dealt with earlier in Abraham Award. By Award No. 6/81 (for convenience, referred to as "Harun Award"), the Industrial Court now agreed with the Union's interpretation of Article 1(b) and contrary to the decision made in Abraham Award, it was held that the intention of the parties as expressed in Article 1(b) was that the terms in that agreement should continue to remain in force until superseded by a new collective agreement and as such there was non-compliance by the Company of the various terms including the provision of Article 30 on the payment of additional EPF contribution. The Company applied by Notice of Motion for an Order of *Certiorari* to remove into the High Court for the purpose of it being quashed Harun Award handed down on 5 January 1981. In the High Court at Kuala Lumpur, Razak J allowed the Company's Motion and quashed Harun Award. The learned Judge upheld the interpretation of Article 1(b) of the agreement as contained in Abraham Award.

We are persuaded to determine whether Razak J was correct in law in holding that the Industrial Court presided by Harun J had acted in excess of jurisdiction when the effect of Harun Award is to reverse and quash the earlier Abraham Award both on the issue of non-compliance of Article 30 and as well as on the question of construction of Article 1(b) of the 1975 agreement. For this determination, two main questions need to be considered. First, whether the Industrial Court presided by Harun J had jurisdiction to hear the complaint on non-compliance by the Company of Article 30; and second, whether the Industrial Court had in Harun Award committed an error of law in construing Article 1(b) of the agreement, and that by such misinterpretation it had done or failed "to do something in the course of the inquiry which is of such a nature that its decision is a nullity" as referred to by Lord Reid at p. 171 in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] AC 147 or the Court "having asked themselves the wrong question" as referred to by Lord Diplock at p. 187 in *In re Racal Communications Ltd.* [1980] 3 WLR 181 had rendered its decision a nullity. In proceedings before the Industrial Court a dispute on jurisdiction can occur at two stages. In a complaint under s. 56(1) or a reference under s. 20 or s. 26; a jurisdictional error can occur at the initial stage affecting the complaint or reference itself; and the second occurrence can take place at the final stage affecting the "award" which by virtue of s. 2 definition includes any decision or order made by the Court under the Act. In *Enesty Sdn. Bhd. v. Transport Workers Union & Anor* FCCA No. 200/1984 this Court has referred to the first jurisdictional dispute as "jurisdiction in the narrow and original sense" as distinguished from "jurisdiction in the wider sense". The former is jurisdiction to enter on an inquiry and the latter is jurisdiction to hear the complaint or reference on its merits. In the present appeal, whether Harun J had jurisdiction to hear the same complaint after Mr. Abraham had dealt with it earlier in another Division of the Industrial Court is a jurisdictional dispute in the narrow and original sense. As to whether the interpretation of Article 1(b) of the collective agreement

made by Mr. Abraham is of the better view than that expressed by Harun J is a jurisdictional dispute in the wider sense. Since the first dispute would necessarily depend on the outcome of the second dispute, in that if the effect of termination of the collective agreement as determined by Mr. Abraham and upheld by Razak J turned out to be the correct interpretation then it must necessarily follow that Harun J could not have jurisdiction under s. 56(1) to hear a complaint of non-compliance with the terms of a non-existent or expired agreement. It should be noted that the basis of the decisions of the two Divisions of the Industrial Court and as well as the order of the High Court on the Union's complaint under s. 56(1) for non-compliance with the terms of the 1975 collective agreement depended on their interpretation of Article 1(b) as to the effect of termination of the agreement. Unfortunately the effect of s. 17(2) of the Act was never fully argued either in the Industrial Court or the High Court. It is only before this Court that the matter has been argued with some intensity.

Now, going back to the crux of the dispute in this appeal, Mr. Abraham ruled that once a collective agreement had been terminated under Article 1(b), it would cease to have binding effect on the parties; whereas Harun J held that notwithstanding such termination, the terms of the agreement would nevertheless continue to have effect until such time as the parties have formulated a new collective agreement. Razak J agreed with Mr. Abraham's interpretation and in allowing the Company's Motion, the learned Judge had this to say at pp. 4 to 6 of his judgment:

> For myself I cannot see how one can seek to extend the meaning of cl. (b) other than what it says in precise terms. The clause provides that the contract shall cease to have effect after the parties had by three months notice terminated it. I do not think one can be made to sound any clearer. If it was intended nevertheless that it was to continue to have effect until such time as the parties had formulated a new Agreement as Counsel urged, it is very strange indeed that the parties had not expressly said so in the Agreement. One would expect them to have said so. It was never said by the parties that this was something which was completely outside their contemplation. I was asked to say also that the Court shall make a purposive approach to the interpretation of cl. (b) so as to ensure harmony among workers thereby preserving industrial peace. But in urging the Court so to do, one is also seeking to give a meaning to a clause which does not exist in the first place. The Court would not merely be interpreting a clause, it would be going outside the limit of the power to interpret seeking to create a new right instead which it has no power to do either expressly or by necessary implication. A similar situation arose in *Hotel Jaya Puri v. The National Union of Hotel, Bar & Restaurant Workers,* [1980] 1 MLJ p. 109. There the President in awarding compensation to the workers gave two months salary and fixed allowances on being discharged or entrenched from their services. There was however nowhere provided in the Agreement giving powers to the Court to make such an award. Salleh Abas FJ (as he then was) said 'The next point I have to consider is the basis how and why the President gave an award of compensation of two months salary and fixed allowances against the Hotel (the employer). I tried to find the basis why compensation is paid at all. If there is a legal basis for paying the compensation, the question of amount of course is very much a matter of the discretion which the Industrial Court is fully empowered under s. 30 of the Industrial Relations Act to fix but where there is no legal basis for the payment of compensation, I do not think that the President can create legal right and obligation for it and, in my view, the award will be clearly an error in law for which I am prepared to allow this application'. It seems to me to be a matter of some wonder why in our case it was urged that cl. (b) would allow the Agreement to be extended and be operative, nevertheless even after the parties had terminated it when this was not expressly provided for, when cl. (c) is a clear reminder to the parties that they should not seek to modify or **add** to any of its terms **whatsoever** except by mutual consent (the underlining is mine). Clearly, what the respondent is seeking to do is to modify and add to cl. (b) what was not there. If it was so intended as urged, then it must be left unanswered

why the agreement had explicitly (unless with consent) prohibited against it in the first place. As I said in the way the President had acted, the case had ceased to be merely a matter of interpretation of the Collective Agreement as envisaged by s. 33 for which it was well within the power of the President to act. It has become one where he has allowed himself to go outside the scope of his jurisdiction altogether.

Reading the plain meaning of the words within the four corners of the 1975 collective agreement, I entirely agree with the conclusion of Razak J on the interpretation of Article 1(b). As indicated by the learned Judge, if the parties had intended that notwithstanding termination, the terms of the agreement would nevertheless continue to have effect until such time as the 1975 collective agreement is replaced by a new agreement, then nothing would be more simpler than by providing a saving clause to that effect in the 1975 agreement. There is no such continuing clause or saving clause in the collective agreement. To agree with Harun J's interpretation of Article 1(b) as to the effect of termination of the agreement would be tantamount the High Court rewriting the agreement for the parties. Indeed, before us Mr. Xavier for the Union concedes that normally there would be a standard continuation clause in the collective agreement to preserve the terms of the terminated agreement during the period of renegotiation for a new collective agreement. There is however no such clause in the instant case. Mr. Xavier relies on the authority of *Trengganu Bus Company Sdn. Bhd. v. Transport Workers Union* [1983] 1 MLJ 393 at 396 for the proposition that it must be implied in any collective agreement that it shall continue even after its expiry date until replaced by a new collective agreement. It is noted that even in that High Court case, the effect of s. 17(2) was never seriously canvassed. We must now consider whether such an implication can be drawn from s. 17(2). s. 17 is now reproduced:

(1) A collective agreement which has been taken cognizance of by the Court shall be deemed to be an award and shall be binding on

(a) the parties to the agreement including in any case where a party is a trade union of employers, all members of the trade union to whom the agreement relates and their successors, assignees or transferees; and

(b) all workmen who are employed or subsequently employed in the undertaking or part of the undertaking to which the agreement relates.

(2) **As from such date and for such period as may be specified in the collective agreement** it shall be an implied term of the contract between the workmen and employers bound by the agreement that the rates of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with the agreement unless varied by a subsequent agreement or a decision of the Court

(**emphasis supplied**).

There are two material parts in s. 17(2), namely (1) "as from such date and for such period as may be specified in the collective agreement" and (2) " it shall be an implied term of the contract... that the rates of wages ... and the conditions of employment ... under the contract shall be in accordance with the agreement unless varied by a subsequent agreement or a decision of the Court".

Thus, on the true construction of the second part of s. 17(2), terms not in the agreement cannot be implied in the contract of service, but the terms to be implied in the contract which is limited to the subject of rates of wages and conditions of employment shall be in accordance with the collective agreement unless varied by a subsequent agreement or a decision of the Court in which event they shall be in accordance with those varied terms. In conjunction

with Article 1(c) the collective agreement can be altered or modified by subsequent agreement to be mutually agreed by the parties or by operation of law, and to my mind the words "alter" and "modify" in the collective agreement have no material distinction in meaning with the word "varied" in s. 17(2) since altering, modifying or varying an agreement would result in some changes in the original agreement. Now, the first part of s. 17(2) governs the period as to when such terms or varied terms shall be implied in the contract, and according to the words used by the legislature, it is limited to the time when the agreement is in force i.e. "as from such date and for such period as may be specified in the collective agreement". In this particular agreement the operative period or time frame is specified in Article 1(a) and (b) i.e. for 3 years with effect from 1 June 1975 to 31 May 1978, and thereafter until terminated by a 3-month notice in writing. Therefore the reading into the contract of service not only the terms but also the varied terms of the collective agreement is only operative from 1 June 1975 until its termination under Article 1(b). In my view, the words "unless varied by a subsequent agreement or a decision of the Court" are subservient to the operative clause or time frame in the first part of s. 17(2). The sub-section does not provide that even outside the time frame i.e. after the agreement is no longer in force, the terms or varied terms of agreement shall continue to be implied in the contract of service and shall continue to be binding notwithstanding the termination of the agreement. Under s. 17(2) the variation of the agreement by subsequent agreement or decision of the Court can only be effected during the binding period of the agreement as envisaged by the first part of that subsequent read with s. 14(2)(b), and not after it has been terminated pursuant to s. 14(2)(c). Thus, under s. 56(1), the complaint must be made when the collective agreement is still operative but not otherwise. As adverted to earlier, the binding period specified for the present collective agreement was three years under Article 1(a) and after that for such further period as the party might wish it to continue until terminated by either party by giving three months written notice under Article 1(b). Once so terminated, the agreement effectively ceases to be operative. The words " unless varied by a subsequent agreement or a decision of the Court" in s. 17(2) refer to a variation made during the period the collective agreement is still in force. The first part of s. 17(2) must be given its ordinary and natural meaning. I am not persuaded that there is any ambiguity in Article 1 of the agreement nor in ss. 14(2) and 17(2) of the Act. In the absence of ambiguity the argument on purposive approach in interpretation does not really arise. To argue that the first part of the subsection is superfluous or that the word "termination" in s. 14(2)(c) is an unfortunate use of the word by the legislature would be going against established principle of construction that there is a presumption against treating any word as surplusage except in obvious cases (see *Curtis v. Stovin* [1889] 22 QBD 512 ; *Ditcher v. Denison*, 14 ER 718 at 723; and *Cowper-Essex v. The Local Board of Action* [1889] 14 AC 153). As such, s. 17(2) does not assist the Union. It is true that under Article 1, termination of the agreement does not mean termination of employment under the contract of service, but it does mean the termination of terms and conditions of employment as agreed in the collective agreement. In *Duport Steels v. Sirs* [1980] 1 WLR 142 at 157 in adopting the strict and literal approach in a case involving Industrial Relations legislation, it was held that where the meaning of words in a statute is plain and unambiguous Judges should not invent fancied ambiguities merely because they themselves consider that the consequences of giving effect to its plain meaning would be inexpedient or even unjust or immoral. The words used by the legislature in s. 17(2) read with s. 14(2) are quite plain, and in any event the strict and literal interpretation of that provision in this appeal would not give rise to an absurd and unjust result or situation as envisaged by Lord Denning in *Nothman v. Barnet London Borough Council* [1978] 1 WLR 220 at 228. When negotiating for a new collective agreement, it may be proper for the parties to agree that certain terms of the new agreement should

come into force with retrospective effect.

Turning now to the argument that an award can only be terminated by the Industrial Court, it is necessary to emphasize that there are two types of "awards" under the Industrial Relations Act although the word is defined in s. 2 to mean "an award made by the Court in respect of any trade dispute or matter referred to it". The first is an award on terms and conditions of employment and work actually awarded by the Court arising from a stalemate in collective bargaining between employers and workmen and their trade Union. There is therefore no collective agreement in the first type of award; whereas the second type of award is the collective agreement voluntarily entered into between the two parties but only deemed to be an award under s. 17. We are here dealing with the second type of award and not an actual award made by the Court arising from a trade dispute and referred to the Court. As such, in this type of award the Industrial Relations Act preserves the freedom to contract by the parties subject only to compliance with the Act and in particular ss. 14 and 15. It is open to the parties to include whatever terms they deem necessary to protect their respective rights and interests unless such terms are prohibited by the Act or other written law. Under s. 2 of the Act, a 'Collective agreement' means "an agreement in writing concluded between an employer or a trade Union of employers on the one hand and a trade Union of workmen on the other relating to the terms and conditions of employment and work of workmen or concerning relations between such parties"; and 'collective bargaining' means "negotiating with a view to the conclusion of a collective agreement". In the instant case, the collective agreement has never been refused cognizance by the Court under s. 16(2)(a) for non-compliance with the provisions of s. 14; nor has it been amended by the Court under s. 16(2)(b). Indeed it has never been the case for the Union that the agreement has not complied with s. 14 or any other provisions of the Act. Razak J is therefore correct in refusing to read into the agreement a continuation clause or saving clause after its termination. The termination of the contract as envisaged in Article 1(b) of the agreement just as the word 'termination' in s. 14(2)(c) of the Act must mean termination pure and simple. From the four corners of the agreement and also from reading the whole provisions of part IV of the Act on 'collective bargaining and collective agreements', I can find no justification in law or in fact for the word 'termination' to mean other than what it ordinarily means, and certainly the word used both in the agreement and the Act cannot mean that the terms of the agreement would continue to be binding notwithstanding the termination of the agreement. Such an interpretation would be absurd since it purports to give special meaning to the word 'termination' which the Act and the agreement never intended. Further, in my opinion there is nothing in s. 17(2) to suggest that the continuation or saving clause should be deemed as a term in the contract of service notwithstanding its absence in the collective agreement. What is the purpose of s. 17(1) transforming a collective agreement into an award by a deeming provision? In my view the purpose is not to dilute further the freedom to contract by the parties but merely to clothe the agreement with all those statutory provisions in the Act for its enforcement during the agreed period that the agreement should be in force and no further.

Thus the Act not only specifically allows but makes it essential where appropriate for provision to be made for termination of the collective agreement although at the same time it encourages such agreement to continue for as long as possible by providing a minimum period of three years so as to ensure continuity and stability in relation between employers and workmen and their trade Unions. It cannot be denied that such policy is in line with the objective of the Industrial Relations Act as any renegotiation for a completely new collective agreement would certainly run the risk of endangering industrial peace. It is not unreasonable for the parties to intentionally exclude a continuation clause in the agreement. In this context, no improper motive should be attached to the Company's conduct in requesting the Union to terminate their agreement

in accordance with Article 1(b) before renegotiation could commence.

In my view there is nothing in s. 17 to suggest that a collective agreement though deemed to be an award cannot be terminated or modified by the parties. Indeed, s. 14(2)(c) empowers the parties to prescribe in the agreement the procedure for its modification and as well as for its termination. Thus, a collective agreement deemed to be an award is capable of being modified or terminated by agreement, and the Industrial Relations Act as it now stands does not prohibit the ordinary law of contract pertaining to modification and termination of contract to be applied. It would therefore follow that once a collective agreement is terminated in accordance with its terms, it ceases to be binding on the parties and under s. 17(2) the terms of the agreement should no longer be implied in the contract of service after termination even for the purpose of renegotiation unless expressly so provided in the agreement itself. Since the Act expressly permits a collective agreement to prescribe for its termination, and pursuant thereto the agreement did so provide for such termination under Article 1(b), the effect of the termination by the Union would be to bring to an end the rights and liabilities of both parties. In the absence of a continuation of saving clause in the agreement, such a term cannot be implied in the contract of service under s. 17(2). In the circumstances, it is my conclusion that Harun J. had committed a jurisdictional error in his interpretation of Article 1 of the collective agreement by holding that termination of the agreement under Article 1(b) did not terminate the terms of the agreement until replaced by a new collective agreement. Harun Award was therefore validly quashed by Razak J. It is inherent in s. 56(1) that the complaint to the Industrial Court for non-compliance can only be made during the currency of the collective agreement and not after its termination. As such Harun J had committed a jurisdictional error not only in the narrow and original sense but also in the wider sense by misinterpreting or disregarding the provisions of ss. 14(2) and 17(2) of the Act in interpreting the effect of termination under Article 1(b) of the collective agreement.

For the above reasons, I would dismiss this appeal with costs, and the deposit should be paid to the respondent to account for taxed costs.

Wan Suleiman SCJ:

I have had the advantage of considering the judgments of my brethren and I would with respect concur with that of Tan Sri Dato' Haji Mohd. Azmi.

In particular I would say that his construction of ss. 14(2) and 17(2) of the Act would be the one I would perforce adopt myself.

We were assured from the bar that most collective agreements have a "continuation" clause keeping alive the "terminated" agreement until a new one is agreed upon, a negotiating exercise which may take considerable time.

Perhaps the majority judgment will ensure that such a continuation clause becomes a standard provision in all collective agreements.

Hashim Yeop Sani SCJ:

The appeal is against the order of Abdul Razak J to quash Award No. 6/81 of the Industrial Court handed down on 5 January 1981. The award was handed down by the Industrial Court presided by Harun J (hereinafter referred to as the "Harun Court") after hearing an application under s. 56(1) of the Industrial Relations Act. Section 56(1) deals with application for non-compliance of any term of an award or collective agreement. The complaint of non-compliance was in respect of certain provisions of a 1975 Collective Agreement between the parties. The Harun Court held that the Collective Agreement was still in force and ordered the

Company to restore all the benefits under the Collective Agreement.

Briefly the events in their chronological sequence are as follows. The parties entered into a Collective Agreement on 29 December 1975. The agreement was taken cognizance of by the Industrial Court on 21 March 1976. Clauses 1(a), (b) and (c) of the Collective Agreement read as follows:

> (a) This Agreement shall be effective and in force for three (3) years from 1 June 1975 to 31 May 1978.
>
> (b) This Agreement shall continue to be in force for a period of three (3) years from the said date **and shall continue thereafter** unless terminated by either party giving three (3) months **notice in writing to renegotiate** but no such notice shall be given before the 1 March 1978.
>
> (c) **During the period of this Agreement** neither the Company nor the Union shall seek to alter, modify, annul or add any of its terms whatsoever except by mutual consent or by operation of Law.
>
> (**Underlining Supplied**)

The Union on 17 June 1978 invited the Company to negotiate for a new collective agreement. The Company replied on 7 July 1978 that it was studying the Union's proposals. Then on 26 July 1978 the Company requested the Union to terminate the 1975 agreement first before negotiation. The Union accordingly terminated the agreement on 4 February 1979 apparently on the advice also of the Ministry of Labour.

Then events took a different turn. The Company withdrew certain benefits without the consent of the Union. The Union lodged a complaint under s. 56(1) of the Act. The complaint was heard on 26 July 1979. The complaint was that the Company had withdrawn benefits under Article 30 of the Collective Agreement relating to EPF contributions. In Award No. 5/80 handed down by the Industrial Court presided by Mr.Abraham (hereinafter referred to as the "Abraham Court") it would appear to be the opinion of the Abraham Court upon preliminary objection, that since the agreement had expired on 3 May 1979 (i.e. three months from 4 February 1979) there could not be any case of non-compliance because there cannot be non-compliance of a non-existent agreement. The Abraham Court made **no order** on the complaint.

Subsequently, another complaint under s. 56(1) was lodged by the Union in 1980 for non-compliance of a number of benefits under the same Agreement unilaterally withdrawn by the Company including the EPF benefits under Article 30. This time the Harun Court however found that the 1975 Collective Agreement was still in force and accordingly ordered the Company to restore all benefits under various Articles of the Agreement which had been abandoned by the Company including Article 30 of the Agreement dealing with Employees Provident Fund contributions. Abdul Razak J ordered the Harun Award to be quashed.

Abdul Razak J dealt with two issues which by their nature go to the question of jurisdiction. Firstly he would seem to have held that the Harun Court had no threshold jurisdiction to hear the complaint because the complaint had been heard and disposed of by the Abraham Court. He said in his judgement.

> But as the Court had found that there had been no breach of the Agreement, there has therefore been no non-compliance as would require the Court to make any Order against any party. There was a decision however made by the President which was to dismiss the respondent's complaint and s. 33(b) expressly provides a decision like an order cannot be

appealed against or reviewed.

Secondly he gave an interpretation of Clause 1(b) of the agreement which was diametrically opposed to the construction given to it by the Harun Court. Referring to Clause 1(b) he said:

> The Clause provides that the contract shall cease to have effect after the parties had by three months notice terminated it. I do not think one can be made to sound any clearer. If it was intended nevertheless that it was to continue to have effect until such time as the parties had formulated to a new Agreement as Counsel urged, it is very strange indeed that the parties had not expressly said so in the Agreement.

As a consequence two principal questions arise in the appeal-

(1) Was the Harun Court in 1981 deprived of jurisdiction to hear the application under s. 56(1) after Award No. 5/80 was handed down by a differently constituted Industrial Court namely the Abraham Court in 1979?

(2) What is the proper interpretation to be given to Clauses 1(a) (b) and (c) of the Collective Agreement?

On the first question, to constitute a *res judicata* an earlier judgement or decision must, in the terms of the Privy Council decision in *Kok Hoong v. Leong Cheong Kweng Mines Ltd.* [1964] AC 993; [1964] MLJ 49 necessarily and with precision determine the point in issue.

Res judicata is based on the principle that once a competent authority has decided on a matter in issue between the parties after a full enquiry the matter should not be permitted to be reagitated. "There are good reasons why this principle should be applicable to decisions of the Industrial Tribunals also" - see *Burn & Co. v. Their Employees* [1957] AIR SC 38 .

In my opinion there is no question to *res judicata* applying in the instant case because firstly non-compliance can happen on successive occasions and as many complaints can be made as there are non-compliances. In other words, s. 56(1) of the Act cannot be construed so as to limit it only to one complaint of non-compliance. Secondly, in this case Award No. 5/80 expressly made **no order** and for this reason there was in effect no order to be set aside and no order binding on the parties for the award was made under s. 56 and not under s. 33 of the Act for the interpretation of an agreement. A decision under s. 33 of the Act on the interpretation of an agreement shall be binding on the parties as the original agreement.

Abdul Razak J also referred to s. 33(b) of the Act. In my opinion the object of s. 33(b) is to prevent an award, decision or order of an Industrial Court to be appealable or reviewed on its merits although it may be quashed if it was made without jurisdiction of the Harun Court to hear the complaint simply because both the Abraham Court and the Harun Court are of coordinate jurisdiction.

Now we come to Clauses 1(b) and (c) of the Collective Agreement. It is true that a collective agreement is not a contract in the strict legal sense but here we are dealing with statute law. Section 14 of the Industrial Relations Act is a general provision on collective agreements. Section 17 of the Act is a specific provision on collective

agreements which have been taken cognisance of by the Court. The two main features of s. 17 are:

> (1) A collective agreement which has been taken cognisance of by the Court shall be **deemed** to be an award and shall be binding on the parties.
>
> (2) The terms of the collective agreement shall not be varied except by a **subsequent collective agreement** or a **decision** of the Industrial Court. The words "varied by a subsequent agreement" in s. 17(2) clearly mean varied by a subsequent collective agreement and not varied by an agreement. The word "decision" in s. 17(2) is a decision of the Industrial Court on a reference under s. 26 (in a trade dispute) or under s. 33 (interpretation and variation of award and agreement) or an order under s. 56(2) of the Act (which empowers the Industrial Court to make an order upon special circumstances to vary or set aside any term of a collective agreement).

Thus the words "during the period of this agreement" in Clause 1(c) of the collective agreement must mean the period until the agreement is replaced by another collective agreement or varied by a decision of the Industrial Court and not otherwise. Therefore the purpose of terminating the agreement is to free the parties to renegotiate for new terms. The termination does not by itself abrogate the terms of the existing agreement. The terms of the agreement continued to have effect until a new collective agreement was reached. The use of the term "terminated" in Clause 1(b) may be unfortunate but it is still the only word to describe the legal fiction where the parties to the collective agreement may be set free to renegotiate for new terms.

The proper approach to the construction of Clause 1(b) and (c) of the agreement must be such so as to give meaning to the system of collective bargaining between employers and employees. Otherwise it will result in an absurd situation whereby the workers' benefits achieved as a result of collective bargaining will be reduced to nought at the end of every three years when the parties wish to renegotiate for a new collective agreement. Surely that is not the intention of the parties. Surely it is also not the intention of Parliament to allow the benefits enjoyed by the workers for the three years to lapse altogether and the renegotiation to begin from scratch. There must be continuity and stability in the relationship of employers and workmen otherwise there will be chaos in industrial relations. In my view Abdul Razak J overlooked these broad objectives of Industrial Relations law when he gave too much emphasis on the technicality of the law of contract of employment. In *United Engineering Workers Union v. Devanayagam* [1967] 2 All ER 367 Lord Guest and Lord Devlin gave a dissenting judgement on the question of whether the office of president of a labour tribunal was not a judicial office within the meaning of s. 55 of the Ceylon Constitution but in their dissenting judgement the two law lords made a pertinent observation on the true perspective of the law of industrial relations in relation to the common law of master and servant. At p. 377 the judgement reads:

> It is commonplace that with respect to industrial relations the common law of master and servant has fallen into disuse. Disputes about conditions of employment are not usually settled by the Courts in accordance with the terms, express or implied, of the contract of service. Trade unionism could no doubt have used its increased bargaining power to obtain more realistic and elaborate contracts of service within the frame work of the old common law, but it preferred to use it to seek advantages irrespective of contract and enforceable not by legal machinery but by the threat of the strike. The law has therefore had to make a new entry into the field of industrial relations. It has had to start again from the beginning, and, as in

the field of international relations, has had to make its way in by formulating methods of securing the peaceful settlement of disputes.

The words "as from such date and for such period as may be specified in the collective agreement" appearing in sub-section 2 of s. 17 of the Act should be construed in the context of the section in which they appear. No collective agreement taken cognisance of by the Court shall be varied or replaced except by a subsequent agreement of a decision of the Court.

Mr. Xavier may have conceded that the collective agreement in this case omitted to include a continuing clause but that does not have any legal effect. It could at best amount to *ex abundanti cautela*.

It is my view therefore that the Harun Court had jurisdiction to hear the complaint under s. 56 of the Act and to make Award No. 6/81 and it had not committed any jurisdictional errors in arriving at the award. The appeal should accordingly be allowed with costs and the order of the High Court be set aside. Deposit to the appellant.

Also found at [1986] 1 CLJ 474